No. 15150

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENN WEIBLE and PATRICIA WEIBLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANTS.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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In Its Review This Court Is Not Restricted by the Findings and Conclusion of the District Court.

Appellee implies that the holding of the District Court may be reversed only if this Court finds that holding to have been clearly erroneous. (Appellee's Br. pp. 9, 18.) On the contrary, since the question here presented is a question of law or a mixed question of law and fact, this Court should review the entire record and in the light of all the evidence before it, substitute its judgment for that of the District Court if it finds that the conclusion of the District Court is contrary to the weight of the evidence. (*Commissioner v. Fiske,* 128 F. 2d 487 (C. C. A. 7, 1942), cert. den. 317 U. S. 635; *Bogardus v. Commissioner,* 302 U. S. 34, 39 (1937).)

Appellants Were "Bona Fide Residents" of Each of the Countries in Which They Lived During the Years 1947, 1948 and 1949 Within the Meaning of That Term as Used in Section 116(a)(1) of the Internal Revenue Code of 1939.

Underlying the argument of appellee in its brief and the holding of the District Court is the mistaken supposition that Section 116(a)(1) of the Internal Revenue Code of 1939 requires "domicile" in a foreign country or countries rather than "residence."

Appellee argues that although appellants may have intended to remain abroad permanently they have not established bona fide residency in any particular country during the taxable years. This argument is premised on the fact that Weible intended, when he had established a smoothly-running manufacturing operation in one country operated by local personnel, to move to another country to repeat the operation. (Appellee's Br. pp. 8, 12 *et seq.*) Therefore, appellee argues, taxpayer's stay in each of the countries where he lived was "temporary" and therefore he did not become a "resident" of those countries.

Appellants respectfully submit that they have established that they were bona fide residents of Australia, Canada and England during the years in question. The statute itself contemplates that a taxpayer may be a resident of several countries during the taxable year by the use of the words, "a bona fide resident of a foreign country or countries during the entire taxable year . . ." (Sec. 116(a)(1), 1939 I. R. C.)

There is no requirement that the taxpayer live in the foreign country permanently or for a "long period of time" as appellee suggests. (Appellee's Br. pp. 7, 9, 12.)

The test of bona fide residence as set forth in the regulations and established by the cases is whether the taxpayer "makes his home *temporarily*" (Reg. 111, Sec. 29.211-2; emphasis added) in a foreign country or countries with the intention of staying for an indefinite period of time to accomplish a purpose which is of such a nature that an extended stay may be necessary for its accomplishment. An intention to move his residence when that purpose is completed does not constitute a person a nonresident. (*White v. Hofferbert,* 88 Fed. Supp. 457 (D. C. Md., 1950); *Glackin v. Commissioner,* 110 Fed. Supp. 372 (D. C. S. D. Ill., 1952); Reg. 111, Sec. 29.211-2.)

In *White v. Hofferbert, supra,* the taxpayer intended to remain in Sweden for an indefinite period until his assignment there was completed and then to proceed to the next foreign assignment given to him. In February, 1942, he left Sweden after a stay of sixteen months (during which time he resided in a hotel) and went to Spain where he lived until December, 1946. He was held to have been a bona fide resident of Sweden in 1943, of Sweden and Spain in 1944 and of Spain in 1945. Taxpayer *Glackin* with similar intent worked in the offices of his company, Trans-World Airlines, in Egypt, Saudi Arabia and Iraq during the year 1950 and was held to have been a resident of those countries during that year within the meaning of Section 116(a)(1).

Contrary to the assertion of appellee (Appellee's Br. pp. 8, 13) appellants intended to remain indefinitely in each of the countries in which they made their home during the years involved. [R. 52-54, 63, 71, 73-74.] Under Weible's employment agreement his assignment in each of the countries to which he was sent was indefinite as

to duration and of a nature that required an extended length of time to accomplish. [R. 52-54, 63, 71, 73-74.] In the consummation of this agreement Weible did in fact live in Australia 28 months, in Canada for 8 months and in England for 17 months. [R. 63, 70, 73, 74.] His original intent was to complete the job of establishing a manufacturing operation in Canada but an emergency in the English branch necessitated a change in plans. [R. 54.] This unexpected change of plans does not alter the original intent to remain in Canada for an indefinite and extended time.

Appellee asserts that, "An intent to remain abroad does not equate with an intent to be a resident of any particular country." (Appellee's Br. p. 14.) Appellants submit that on the contrary the intent to remain abroad is an important evidentiary factor in determining the existence of an intent to become a resident of a particular foreign country. An intent to remain abroad signalizes an intent to abandon residence in the United States. Section 116 (a)(1) does not contemplate that a taxpayer have two independent "residences" at the same time. (*Seeley v. Commissioner,* 186 F. 2d 541, 543.) Therefore, by establishing their intent to remain in each of the countries where they were assigned for an indefinite and extended stay, and by negating any intent to return to a residence in the United States at the termination of such stay, appellants have carried their burden of proof in the strongest manner possible.

Appellee relies on the application which Weible allegedly filed with the Australian tax authorities to establish his non-residence in that country. (Appellee's Br. pp. 14-15.) The word "residence" is a slippery word and has many

meanings depending on the context in which used. (*Commissioner v. Swent,* 155 F. 2d 513, 515.) In determining the application of a United States statute, the law of this country rather than the law of Australia governs. The reason for Australia granting a tax exemption to foreign persons whose activities would assist in the development of Australian industry has no relation to the intent of Congress in formulating the exemption from income tax provided by Section 116(a), and therefore, assuming that Weible executed the application set forth in Defendant's Exhibit A, it cannot be concluded therefrom that Weible did not intend to become a resident of Australia as that term is defined in the American law.

Furthermore, the application purportedly executed by Weible was not properly authenticated and was erroneously admitted in evidence over plaintiff's objection on the grounds set forth in Plaintiffs' Supplemental Memorandum. [R. 81, 26-30.]

Appellee relies on the fact that Weible retained membership in a private club in the United States to bely his intent to become a resident of the countries here involved. However, Weible testified that when he left the United States he changed this membership to an inactive one which could be maintained at a nominal cost [R. 84] and that this membership enabled him to secure club privileges in the countries where he resided. [R. 69.]

Appellee also relies on the fact that Weible retained a vacant lot in this country on which he made mortgage payments during the taxable years. Appellants have found no cases, and submit that there are none, holding that the retention of property in the United States for investment purposes will deprive a taxpayer of the ex-

emption provided by Section 116(a). At most, the retention of that lot indicates an intent to return eventually to the United States, the place of Weible's domicile. Such an intent, of course, does not conflict with his intent to reside in Australia, Canada and England during the interim.

Respectfully submitted,

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